United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1490

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DOCKET NO. 76-1490

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

MARION E. MEADOWS,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

WILLIAM S. HERRMANN
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ISSUES PRESENTED

In the opinion of the appellant the following issues are presented:

1. Where evidence has been concededly and patently illegally seized by government agents and a suppression hearing is neither requested nor needed should a witness in grand jury proceedings be held in contempt for refusing to give handwriting exemplars to the government for comparison to the concededly and patently illegally seized evidence?

2. Is it a violation of the Fourth and Fifth Amendments of the United States Constitution to compel a witness in grand jury proceedings to give handwriting exemplars for comparison to illegally seized evidence?

3. Where there is no evidence that one alleged standard exists and even if it does it has no handwriting on it, only numbers, and the only connection of the witness with the alleged crime is an alleged note concededly and patently illegally seized should the witness be compelled to give handwriting exemplars?

4. Is it a violation of the Constitutional and statutory rights of the witness to compel him to give physical evidence to the executive branch of the government, to wit, the Department of Justice?

STATEMENT

The District Court for the District of Connecticut, Zampano, J., has found the appellant in contempt for refusing to provide handwriting exemplars and fingerprints to the government and has remanded him to the custody of the United States Marshall where to date he remains.

On October 5, 1976, the witness appeared before the grand jury pursuant to subpoena. Upon appearing before the said grand jury the witness refused to give handwriting exemplars and fingerprints to government agents and did so on the ground of Constitutional privilege under the Fourth and Fifth Amendments of the United States Constitution and on the further ground that the government is compelling the witness to give same directly to governmental agencies or government agents of the executive branch and not to the grand jury which has no evidence before it and no knowledge of the proceedings. (APP. pp. 57-70)

Thereafter, on October 5, 1976, the government filed an application with the District Court for an order directing the witness to furnish exemplars of his handwriting and fingerprints, (APP. p. 11), which application was based upon two affidavits of an Assistant United States Attorney submitted to the District Court on said day. (APP. pp. 11-15).

Then, on October 5, 1976, the Court entered an order directing the witness to submit his handwriting exemplars and finger-

prints (App. pp. 16, 17) and upon his refusal to do so the Court entered an order of judgment and commitment committing the witness to the custody of the U.S. Marshal for the District of Connecticut for contempt of Court until such time as the witness shall obey the order heretofore entered directing him to furnish his handwriting exemplars and fingerprints or until the end of the term of the grand jury. (APP. pp. 5-7).

The District Court stayed the order of commitment until November 9, 1976 (APP. p. 94) at which time this Court vacated the stay and the witness surrendered to the U. S. Marshall in whose custody he remains to date.

The government alleges there was a bank robbery and that a withdrawal slip with some numbers on it (APP. pp. 37, 52, 53) and a demand note were used in the robbery. It claims government agents recovered the withdrawal slip at the bank and seized the demand note from a small stove or fireplace at the home of the witness (APP. pp. 95, 96).

The record of this matter on its face shows no search warrant was obtained for said search and seizure and no arrest was made incident thereto. The statement by the government (APP. p. 96) that Meadows surrendered himself to authorities is in all respects false. No permission was or could have been given to enter the premises as they were unoccupied at the time. (APP. p. 96).

On said October 5, 1976, the day the witness appeared and for the first time, the information concerning the illegal search and seizure was, it appears inadvertently, revealed by the government attorney on oral argument (APP. pp. 37-39) which information up to this time the government had suppressed; it was at that time also established that not only was there no evidence before the grand jury, legal or illegal, but that the government attorneys and the grand jury not only never had any of the purported documents and evidence referred to in the various applications and affidavits but had never even seen any of the alleged items constantly claimed in the affidavits and applications as the basis for the alleged urgent immediate necessity of the handwriting exemplars and fingerprints of this witness. (APP. p. 41 l. 25, p. 42 l. 2, p. 49 ll. 10-15, p. 50 ll. 11-15, p. 58 l. 18-25, pp. 59-62).

The issue of the witness's fingerprints has been academic since October 4, 1976 when government agents fingerprinted him when he was taken into custody on the capias. (APP. pp. 9, 10).

POINT I

THE REFUSAL OF THE WITNESS TO PROVIDE HANDWRITING EXEMPLARS IS PERMISSABLE; THE PURPORTED WRITING TO WHICH IT IS TO BE COMPARED WAS CONCEDEDLY AND PATENTLY SEIZED ILLEGALLY; NO SUPPRESSION HEARING IS REQUESTED OR NEEDED AND THE WITNESS HAS A GOOD DEFENSE TO THE CHARGE OF CONTEMPT.

It is respectfully submitted that the holding of U.S. v. Calandra, 414 U.S. 338, is not applicable to this case. That case dealt with a suppression hearing and with a witness who had been granted immunity. It held that a grand jury witness cannot refuse to answer questions on the ground that they are based upon evidence obtained in violation of the Fourth Amendment. U.S. v. Smith, et al., 423 U.S. 1303; In re Persico, 491 F2d 1156.

In the words of Mr. Justice Douglas, "Calandra cannot be read as approving illegal seizures of evidence. The only question before the Court was whether a potentially disruptive challenge to the seizure of evidence would lie during grand jury proceedings." Smith v. U.S., et al., 423 U.S. 1303.

It is respectfully submitted that In re Persico, 491 F2d 1156 sets forth the rule to be followed in this case and the refusal of the witness to provide handwriting exemplars is permissable and proper.

Here no questions have been asked of the witness and a suppression hearing which might disrupt the grand jury proceedings has been neither requested nor is one needed.

The purported demand note to which the handwriting exemplars are allegedly to be compared was seized by government agents at the witness's home which at the time was unoccupied. (APP. p. 95 ll. 6-13, p. 96 ll. 1-9). The record of this case proves on its face that no search warrant was ever issued or returned and that no arrest was at any time made. The statement in the government's memorandum (APP. p. 96 ll. 7-8) that Meadows surrendered himself to authorities is false.

The government concedes that the witness would have standing at some point to object but claims that grand jury proceedings are not to be interrupted by questions as to the legality of evidence to be presented to them. (APP. p. 39 ll. 12-22).

There is a patent absence of legality as to the search and seizure of the purported demand note. On the record there was no warrant, no arrest and no permission to enter. In addition there is a concession by the government of illegallity. No plenary suppression hearing is requested or needed to prove the illegal search and seizure. Thus, the policy to exclude illegally seized evidence and the policy of the maintenance of unimpeded grand jury proceedings are both served by permitting the witness to refuse to provide handwriting exemplars. In re Persico, 491 F2d 1156.

And as held by the United States Supreme Court, "The 'general rule,' as illustrated in Blue, is that a defendant is not entitled to have his indictment dismissed before trial simply because the

Government 'acquire(d) incriminating evidence in violation of the (law),' even if the 'tainted evidence was presented to the grand jury.' * * * But that rule has nothing whatever to do with the situation of a grand jury witness who has refused to testify and attempts to defend a subsequent charge of contempt." Gelbard v. U.S., 408 U.S. 41, 60.

Although the review of the contempt order at this time may involve an interruption of the purported grand jury investigation it is proper. "(N)ot to allow this interruption would forever preclude review of the witness' claim, for his alternatives are to abandon the claim or languish in jail." Cobbledick v. U.S., 309 U.S. 323, 328.

POINT II

TO COMPEL THE WITNESS TO GIVE HANDWRITING EXEMPLARS FOR COMPARISON TO THE ILLEGALLY SEIZED PURPORTED DEMAND NOTE VIOLATES HIS FIFTH AMENDMENT RIGHTS AGAINST SELF-INCRIMINATION AND TO DUE PROCESS OF LAW AS WELL AS HIS FOURTH AMENDMENT RIGHTS.

It is respectfully submitted that the holdings of U.S. v. Dionisio, 410 U.S. 1; U.S. v. Mara, 410 U.S. 19 and U.S. v. Calandra, 414 U.S. 338 are not applicable to this case.

None of these cases dealt with a situation such as here, where the purported item to be used for the comparison was illegally seized and the witness has been ordered to create and provide physical evidence for comparison to the illegally seized item.

United States v. Calandra specifically stated that a grand

jury cannot violate a witness's Fifth Amendment rights and in U.S. v. Dionisio the words of the Court were that a grand jury subpoena is not some talisman that dissolves all constitutional protections and they must operate within the limits of the First Amendment as well as the Fifth. U.S. v. Dionisio, ibid, pp. 411, 412.

The cases of In re Millow, 529 F2d 770; U. S. v. Turk, 526 F2d 654 and U.S. v. Weir, 495 F2d 879 cited by the government all involved situations in which the witness was granted immunity and thus, Fifth Amendment objections were not relevant.

It is respectfully submitted that to compel the witness to create evidence by providing handwriting exemplars to be compared by the government to an alleged demand note which was illegally seized by government agents violates the witness's rights against self incrimination and the deprivation of life, liberty and property without due process of law. Olmstead v. United States, 277 U. S. 438, opinions of Justices Brandeis, Holmes and Butler concurred in by Justice Stone.

POINT III

THERE IS NO EVIDENCE THAT A WITHDRAWAL SLIP EXISTS OR IS IN THE GOVERNMENT'S POSSESSION. CONCEDEDLY THE ALLEGED WITHDRAWAL SLIP HAS NO HANDWRITING ON IT, ONLY SOME NUMBERS AND THERE IS NO CONNECTION BETWEEN THE WITNESS AND THE ALLEGED WITHDRAWAL SLIP OTHER THAN THE ILLEGAL EVIDENCE.

The alleged withdrawal slip allegedly found at the bank has no handwriting on it, only numbers (APP. pp. 37, 52, 53). The

handwriting exemplars can be of no use for comparison to this item even if it does exist and is in the government's possession.

There is no evidence before the Court that such a withdrawal slip exists or is in the possession of the government. The Assistant United States Attorney in charge of this investigation does not have it, neither has he seen it nor a copy of it. (APP. p. 37 ll. 13-18, p. 24 l. 25). The grand jury does not have this alleged withdrawal slip and has neither seen it nor a copy of it. (APP. p. 59, p. 60 ll. 2-7).

It is respectfully submitted that ordering handwriting exemplars for supposed comparison to this item lacks legal basis, In re Grand Jury Proceedings, 486 F2d 85, and as there is no connection between the alleged withdrawal slip and the witness other than the illegally seized evidence that to hold the witness in contempt for refusing to give the exemplars for this purpose violates his Constitutional rights. In re Grand Jury Proceedings, Harrisburg, Pennsylvania, 450 F2d 199; Gelbard v. U.S., 408 U.S. 42.

POINT IV

THERE IS NO GRAND JURY PROCEEDING HERE BUT THE USE OF THE NAME OF THE GRAND JURY AS A FICTION TO COVER A JUSTICE DEPARTMENT INVESTIGATION AND IT IS UNLAWFUL TO DETAIN THE WITNESS TO COMPEL HIM TO CREATE AND PROVIDE EVIDENCE FOR THE EXECUTIVE BRANCH OF THE GOVERNMENT.

There is no evidence of any kind before the grand jury in this matter and it appears that the grand jury is substantially

uninformed as to the whole proceeding. (APP. pp. 57-62).

Any alleged evidence which may exist is, according to the Assistant United States Attorney in charge, in the possession of the F.B.I. (APP. p. 41 ll. 4-25, p. 42 l. 2, p. 50 ll. 10-15).

"The Constitution itself makes the grand jury a part of the judicial process . . . . The proceeding before a grand jury constitutes a 'judicial inquiry', Hale v. Henkel, 201 U.S. 43, 66." Cobbledick v. U. S., 309 U.S. 323, 327. "The grand jury's historic functions survive to this day. Its responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions." U. S. v. Calandra, 414 U.S. 338.

In this case the grand jury is doing and is able to do nothing. This is not a judicial inquiry but an attempt by the Justice Department under color of law to detain this witness in order to compel him to create and provide evidence for it in violation of his Constitutional and statutory rights. Beightol v. Kunowski, 486 F2d 293.

CONCLUSION

WHEREFORE, appellant respectfully submits that the order of the District Court holding the witness in contempt be reversed and the witness be ordered released from custody.

Dated: Stamford, Connecticut

December 3, 1976

Respectfully submitted,
MARION E. MEADOWS

by William S. Herrmann
WILLIAM S. HERRMANN
His Attorney

CERTIFICATION

This is to certify that a copy of the foregoing brief was mailed postage prepaid to Peter C. Dorsey, Esq., U. S. Attorney, 270 Orange Street, P. O. Box 1824, New Haven, Ct. 06508 this 4th day of December, 1976.

William S. Herrmann
WILLIAM S. HERRMANN